

² The Board notes that appellant submitted additional evidence on appeal after OWCP issued its August 2, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

This case has previously been before the Board.³ Appellant, a 67-year-old former maintenance worker/mail clerk, has an accepted occupational disease claim (Form CA-2) for bilateral lateral epicondylitis and aggravation of bilateral localized primary hand osteoarthritis (basal joint/thumb), which arose on or about June 25, 2009.⁴ On December 20, 2014 he filed a claim for a schedule award (Form CA-7).

In a January 29, 2015 decision, OWCP denied appellant's claim for a schedule award because he had not submitted an impairment rating in accordance with OWCP's prior instructions.

On an appeal request form dated and postmarked February 17, 2015, appellant requested a telephonic hearing with OWCP's Branch of Hearings and Review. It was held on September 8, 2015.

By decision dated November 17, 2015, OWCP's hearing representative affirmed OWCP's January 29, 2015 decision. She noted that appellant's treating physician, Dr. Stephen Popper, an osteopath, was equivocal with respect to whether he had reached maximum medical improvement (MMI). Whereas Dr. Popper had previously indicated that appellant reached MMI, the hearing representative noted that his latest report, dated October 17, 2013, indicated that appellant had not reached MMI. In light of the treating physician's apparent equivocation, she found that the record was devoid of medical evidence establishing that appellant's condition had reached a permanent and fixed state.

Appellant appealed to the Board on December 16, 2015.

In its April 4, 2016 decision, the Board found that the case was not in posture for decision regarding entitlement to a schedule award. The Board determined that there was sufficient medical evidence of record that appellant reached MMI in 2013, thereby warranting further development regarding the issue of permanent impairment. Accordingly, the Board set aside the hearing representative's November 17, 2015 decision, and remanded the case to OWCP for referral to a second opinion physician to address the extent of any bilateral upper extremity permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) (2009). The facts and circumstances opined in the Board's April 4, 2016 decision are incorporated herein by reference.

In a May 24, 2016 report, Dr. James H. Rutherford, a Board-certified orthopedic surgeon and OWCP-referral physician, reviewed appellant's medical records, a statement of accepted facts, and provided his findings on physical examination. Based on his evaluation, he found that appellant did not have ratable permanent impairment due to the accepted condition of bilateral

³ Docket No. 16-0344 (issued April 4, 2016).

⁴ Appellant last worked for the employing establishment in March 2013. OWCP paid wage-loss compensation for temporary total disability through November 15, 2014. Effective November 16, 2014, appellant elected to receive a disability retirement annuity from the Office of Personnel Management.

lateral epicondylitis. However, Dr. Rutherford found that there was permanent impairment based on appellant's accepted condition of aggravation of bilateral hand osteoarthritis. He rated appellant based on the range of motion (ROM) method because there was "no category for arthritis of the hands" under the diagnosis-based impairment (DBI) method. Dr. Rutherford provided ROM measurements for the various joints of the thumb interphalangeal, metacarpophalangeal (MCP), and carpometacarpal and four fingers distal interphalangeal, proximal interphalangeal and MCP of each hand.⁵ He first calculated the individual digit impairments, then determined the corresponding percentage of impairment to the hand, and ultimately converted the hand impairment to an upper extremity impairment utilizing Table 15-12, A.M.A., *Guides* 421 (6th ed., 2009). With respect to appellant's right thumb/finger(s) ROM limitations, Dr. Rutherford found 31 percent permanent impairment of the right upper extremity. Regarding the left upper extremity, he found 22 percent permanent impairment.

On June 13, 2016 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and district medical adviser (DMA), reviewed the medical evidence of record and noted his disagreement with Dr. Rutherford's May 24, 2016 impairment rating. The DMA explained that he utilized the preferred DBI method for calculating appellant's permanent impairment. He rated appellant under Table 15-2, Digit Regional Grid, A.M.A., *Guides* 392 (6th ed., 2009) based on a diagnosis of degenerative joint disease. Although the default (grade C) rating for class 1 impairment was six percent, the DMA assigned eight percent (grade E) digit impairment for each thumb and finger, bilaterally. He indicated that the combined digit impairments of the thumb and four fingers on each hand represented eight percent bilateral upper extremity permanent impairment.

By decision dated August 2, 2016, OWCP granted appellant a schedule award for eight percent permanent impairment of each upper extremity. The bilateral upper extremity award, totaling 16 percent, covered a 49.92-week period from May 24, 2016 through May 8, 2017.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.⁶ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁷ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined.

⁵ With respect to appellant's right and left thumbs, Dr. Rutherford found 20 percent permanent digit impairment, bilaterally pursuant to Table 15-30, Thumb Range of Motion, A.M.A., *Guides* 468 (6th ed., 2009). In determining impairment of the individual fingers, he applied Table 15-31, Finger Range of Motion, A.M.A., *Guides* 470 (6th ed., 2009). For the right and left index (2nd) fingers, Dr. Rutherford found 45 and 25 percent permanent digit impairment, respectively. Regarding appellant's middle (3rd) finger on each hand, he found 45 percent on the right and 25 percent permanent digit impairment on the left. Lastly, the ring (4th) and little (5th) fingers on both hands had 41 percent and 25 percent permanent digit impairment on the right and left side, respectively.

⁶ See 20 C.F.R. §§ 1.1-1.4.

⁷ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁸

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled “Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*.” The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁹ The Board has approved OWCP’s use of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁰

ANALYSIS

The issue is whether appellant has met his burden of proof to establish that he has more than eight percent permanent impairment of each upper extremity for which he previously received schedule awards. The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹¹ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹² In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and DMAs use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP’s own physicians are inconsistent in the application of the

⁸ 20 C.F.R. § 10.404; *see also* *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁹ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹⁰ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹² *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.¹³

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the August 2, 2016 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 10, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹³ *Supra* note 11.